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No. 81-2390

In the Supreme Court of the United States

OCTOBER TERM, 1982

OSCAR RUTSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims erred in holding that his claim for military disability retirement payments (see 10 U.S.C. (& Supp. V) 1201 *et seq.*) is barred by the statute of limitations.[1]

1. During World War II petitioner was a bombardier in the United States Air Force and participated in 39 combat missions. Pet. App. 2A, 14A-16A. Following his last mission, petitioner was hospitalized for psychiatric observation and treatment. *Id.* at 2A-3A, 17A-18A. Six months later,

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[1]Effective October 1, 1982, the Court of Claims was abolished and its jurisdiction transferred to the new United States Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

petitioner was discharged from the hospital and given "full flying duty status" (*id.* at 3A). On December 2, 1945, petitioner was discharged from the Air Force. *Ibid.*

Approximately 26 years later, petitioner sought correction of his military records to reflect that he was permanently disabled when he was discharged. Under 10 U.S.C. (& Supp. V) 1552, such corrections are available when the Secretary of a military department "considers it necessary to correct an error or remove an injustice." In addition, such corrections may be accompanied by lost pecuniary benefits. On September 25, 1972, the Air Force Board for the Correction of Military Records rejected petitioner's request, stating (Pet. App. 6A):

> The administrative regulations and procedures established by the Secretary of the Air Force for the guidance of the Board provides [*sic*] that an application may be denied where the applicant has not submitted sufficient evidence to establish a showing of probable error or injustice in the case.
>
> I regret to advise you that a careful consideration by the Board of your military record, together with such facts as have been presented by you, fails to establish a showing of probable error or injustice in your case. However, you are privileged to submit new and material evidence for the consideration of the Board. In the absence of such additional evidence tending to show the commission of an error or injustice, no further action on your application is contemplated.

Petitioner did not seek judicial review of this final agency action. Instead, he filed two additional requests for corrections, which were denied on June 5, 1975 (Pet. App. 8A), and December 30, 1976 (*id.* at 10A).[2]

Petitioner filed this lawsuit on September 24, 1979. The Court of Claims found (Pet. App. 3A) that petitioner's "claim accrued on September 25, 1972, upon the final action by the * * * Air Force Board for the Correction of Military Records." Accordingly, the court held that petitioner's claim was barred by the six year statute of limitations prescribed in 28 U.S.C. 2501. Pet. App. 3A-4A.

2.a. Relying on 5 U.S.C. 555(e), petitioner contends (Pet. 11-15) that the September 25, 1972 letter does not sufficiently state the grounds for denial of his request for relief. But the letter plainly states that relief was denied because petitioner failed to establish either "probable material error or injustice." In any event, as we understand it, petitioner's argument is that the September 25, 1972 letter did not trigger the statute of limitations because it failed to set out the grounds for denying relief as required by the Administrative Procedure Act. No such argument was made in the Court of Claims and, therefore, it should not be considered here. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 234-235 n.1 (1980); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). Moreover, the adequacy of the statement of reasons for denial of the request for relief is simply immaterial. At the latest, a claim for military disability retirement pay "accrues" within the meaning of 28 U.S.C. 2501 when the first "proper board has acted or

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[2]The Board for the Correction of Military Records recommended that petitioner's third request for relief be granted (Pet. App. 12A-20A). The Assistant Secretary of the Air Force for Manpower and Reserve Affairs rejected that recommendation (*id.* at 22A-25A).

declined to act" on the claim. *Friedman* v. *United States*, 310 F. 2d 381, 389-390 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). A serviceman is free to pursue whatever avenues for obtaining relief he deems most likely to be effective, including repeated submissions to the Board for the Correction of Military Records. If he intends to seek judicial consideration of the claim, however, he must file suit within six years of the first decision.

b. For similar reasons, petitioner's Fifth Amendment argument (Pet. 15-21) is unavailing. Petitioner seems to contend that the Due Process Clause requires the Air Force (1) to communicate the finality of the decisions of the Board for the Correction of Military Records more clearly;[3] and (2) to notify claimants that they have the right to seek judicial consideration of their claims within a specified time. Again, petitioner failed to raise these contentions in the court below. In any event, the contentions are irrelevant to the statute of limitations issue presented in this case. After the Board for the Correction of Military Records' first decision, petitioner had six years to file suit on his claim. At least by November 20, 1976, he was represented by counsel. See Pet. App. 14A; see also *id.* at 10A. Yet petitioner failed to file suit until nearly three years after the *third* Air Force denial of his request for relief and seven years after the first such decision. Whatever substantive deficiencies there might have been in the Air Force determination of petitioner's claim, they do not excuse petitioner's failure to seek judicial review within the period provided by law.

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[3]The September 25, 1972 letter (Pet. App. 6A) unambiguously states that "no further action on [petitioner's] application [was] contemplated," unless he submitted new evidence tending to show probable error or injustice.

3. Finally, contrary to petitioner's argument (Pet. 22), the Court of Claims' holding that petitioner's claim accrued when his request for relief was first denied is fully consistent with *Friedman* v. *United States, supra*, and *Bruno* v. *United States*, 556 F. 2d 1104 (Ct. Cl. 1977). In both *Friedman* and *Bruno*, the court denied relief on the ground that the claim accrued more than six years before the lawsuits were filed. *Friedman* (310 F. 2d at 391, 396) and *Bruno* (556 F. 2d at 1106) acknowledge that the decision of the first board to consider a request for relief might not trigger the statute of limitations if the claimant is misled or the decision is only tentative and invites reopening. Here, however, the Court of Claims explicitly found that the September 25, 1972 letter was neither misleading nor tentative. There is no need for further review of the fact-bound question whether the Court of Claims correctly applied its precedents to the circumstances of this case.[4]

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[4]Petitioner's reliance (Pet. 22-23) on *Denton* v. *United States*, 204 Ct. Cl. 188, 196 (1974), cert. denied, 421 U.S. 963 (1975), and *Lipp* v. *United States*, 301 F. 2d 674, 676 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963), is misplaced. In *Denton* (204 Ct. Cl. at 196), the court noted that if "the service itself moved to accord the plaintiff a new hearing on the basis of a new regulation or interpretation of the law," the statute of limitations would be tolled pending a subsequent decision. Here, as in *Denton*, no such action has been taken by the military. In *Lipp*, the court dismissed a petition as untimely even as measured from the military retirement board's most recent denial of the claimant's request for relief and notwithstanding action by the Army Board for the Correction of Military Records within six years of the filing of the petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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